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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1461

THELMA B. STANTON,
Appellant,

v.

JAMES LAWRENCE STANTON, JR.
Appellee.

On Appeal from the Supreme Court of the
State of Utah

BRIEF FOR THE APPELLEE

D. GARY CHRISTIAN
KIPP AND CHRISTIAN
520 Boston Building
Salt Lake City, Utah 84111
Attorney for Appellee

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JAMES LAWRENCE STANTON, JR.
Appellee.

On Appeal from the Supreme Court of State of Utah

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal arises from a divorce action between appellant and appellee. Pursuant to stipulation of the parties a Decree of Divorce was entered November 29, 1960. The Stipulation and the Decree *inter alia* granted appellant custody of the minor children Sherri Lyn and Rick and ordered appellee to pay appellant $100.00 per month for each child (A. 1, 3-6).

Section 15-2-1, Utah Code Annotated (1953) provides that single women achieve their majority at age eighteen, and men at twenty-one. Thus, when Sherri turned eighteen

on February 12, 1971 appellee discontinued Sherri's support payments. On May 13, 1973 appellant moved the trial court for a judgment against appellee in the amount of $3,000.00 representing alleged delinquencies in support payments for the use of Sherri from February 12, 1971.

The trial court denied appellant's motion, citing §15-2-1. (A. 23). From this ruling, appeal was taken to the Utah Supreme Court, based upon the theory that the statute contravened the Equal Protection and Due Process Clauses of the United States Constitution.

When the State Supreme Court affirmed the trial court's decision, Mrs. Stanton appealed to this court.

SUMMARY OF ARGUMENT

There are several reasons why appellee believes this appeal should be dismissed. On a procedural level appellee believes that the facts show that appellant lacks standing and that the issue is moot.

Appellant lacks standing because she is not a member of the age group affected by the statute and because in her individual capacity as a trustee or fiduciary she lacks the personal stake in the outcome required by this court. Furthermore, since appellant stipulated that support payments should be paid only to her children, she waived her right to now assert that payments should continue after Sherri achieved majority.

The issue is moot because neither Sherri nor appellant is now a member of the eighteen to twenty-one age group.

On a substantive level appellee contends that this court should apply the "rational basis" test; and that the statutory scheme under attack here does have a rational basis.

Finally, even if it is held that the statute is unconstitutional, appellee believes that this court should remedy any inequality by expanding the coverage of the statute to allow men to be treated as adults at age eighteen rather than by withholding the privileges of adulthood from women until they reach twenty-one.

POINT I.

APPELLANT LACKS STANDING TO ATTACK THE CONSTITUTIONALITY OF SECTION 15-2-1, UTAH CODE ANNOTATED (1953)

It is a well established rule of this court that only individuals whose interests have been prejudiced or who will suffer direct substantial injury as a result of application of a statute may attack its constitutionality *Barrows vs. Jackson,* 346 U.S. 249, 97 L.Ed. 1586, 1595 (1952). Similarly, it has been stated that where a legislative enactment is being attacked, a logical link between the status of the challenger and the statutory scheme must be established *Flast vs. Cohen,* 392 U.S. 83, 102, 20 L.Ed.2d 947, 963 (1968).

On its face the statute under attack purports to grant the privileges of majority to women eighteen years of age and older while withholding such benefits from men until they reach twenty-one.

Even though appellant is not an individual whose age falls in the eighteen to twenty-one age group, she nonetheless claims standing to attack the statute based upon the well

recognized right of a mother to bring an action against a father for delinquencies in support payments. It is, however, clear that the wife's interest is at best derivitive and indirect. Her position has been analogized to that of a fiduciary with respect to the amount paid, H. Clark, *The Law of Domestic Relations in the United States* (1968) p. 494; to a guardian who must use the payments for the child's benefit, *id.* at 490; and to a trustee *Rosenblat vs. Birnbaum,* 245 N.Y.S.2d 71, 75 (1963), *affd.* 264 N.Y.S.2d 521, 212 N.E.2d 37 (1965); *Harper vs. Ballensinger,* 177 S.E.2d 693, 698 (Ga. 1970); *Grace vs. Quigg,* 276 N.E.2d 594, 598 (Ind. 1971); *Nelson on Divorce and Annulment,* §14.90 (2nd ed. 1961).

As to a wife's interest in child support payments it has been stated:

> [A] wife, awarded the custody of the children, has no proprietary rights in the amounts ordered to be paid by the husband for their support, and the money paid under the decree can be used only for the benefit of the children. 27B C.J.S. *Divorce* § 321(2)

That the wife has no interest in child support payments can be seen in the Internal Revenue Code which exempts such payments from the wife's income, Int. Rev. Code of 1954, § 71(b), and in various Utah cases where it has been stated that even by stipulation of the wife the husband may not reduce such payments. *French vs. Johnson,* 16 Utah 2d 360, 401 P.2d 315 (1965); *Larsen vs. Larsen,* 5 Utah 2d 224, 300 P.2d 596 (1956).

If appellant has no interest in the payments, her only "personal stake in the outcome of the controversy" *(Baker vs. Carr,* 369 U.S. 186, 204 (1962)) must be the right to bring an action against the husband for recovery of the amounts payable for the child's benefit.

In attempting to determine whether a party has a sufficient interest in a dispute to have standing to attack a legislative-enactment, this court has laid down the following rule:

> The 'gist of the question of standing' is whether the the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Flast, supra,* at 961, quoting *Baker, supra,* at 204.

In this case it is clear that appellant lacks such a personal stake in the outcome. At issue here is the constitutionality of a statute which bestows the rights of majority on certain individuals. In her Brief appellant acknowledges a raft of benefits to those who are acknowledged as adults under the law. See Brief of Appellant at pp. 20-21. Appellant also acknowledges that a determination that § 15-2-1 is unconstitutional may lead to a raising of the minimum age to twenty-one rather than a lowering to age eighteen. In fact, appellant urges that in the event the statute is voided, the age of twenty-one be adopted as the age of majority. *Id.* at 29, 30.

Thus it appears that appellant's interest, real or imagined, is inimical to the very class (i.e., women eighteen to twenty-one) whose interest she claims to represent. It is thus difficult to understand how appellant can assert such a "personal stake in the outcome as to assure concrete adverseness." *Baker vs. Carr, supra.*

Indeed, appellant is not herself discriminated against, if at all, on the basis of her sex. A male under like circumstances would be treated no differently than she. At best, there is a distinction drawn in § 15-2-1 between males and

females of a certain age group (eighteen to twenty-one) to which she does not belong. If appellant's daughter felt that she was the victim of invidious discrimination, having obtained her majority she could bring an action in her own name. Rule 17(b), Utah Rules of Civil Procedure.

Furthermore, any discrimination in support payments to eighteen-, nineteen-, and twenty-year-old women engendered by § 15-2-1 is eliminated by Utah's Uniform Civil Liability for Support Act, §§ 78-45-1, et seq., Utah Code Annotated (1953, Supp. 1973).

The pertinent provisions of the Act are as follows:

78-45-2. Definitions. — As used in this act:

* * *

(2) 'Obligor' means any person owing a duty of support.

(3) 'Obligee' means any person to whom a duty of support is owed.

(4) 'Child' means a son or daughter under the age of twenty-one years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.

* * *

78-45-3. Duty of a man. — Every man shall support his wife and his child.

78-45-4. Duty of a woman. — Every woman shall support her child; . . .

* * *

78-45-9. Enforcement of right to support — Powers of state department of public welfare. — The obligee may enforce his right of support against the obligor and the state department of public welfare may proceed on behalf of the obligee to enforce his right of support against the obligor. . . .

Under the Utah statutory scheme both males and females in the eighteen to twenty-one age group have a right to support. Thus, even if it could be said that appellant had standing to represent her daughter's interest in attacking a statute which discriminated between men and women of different ages, there is no such discrimination under the Utah statutory scheme.

Finally, even if appellant otherwise has standing to attack the statute because it has the effect of preventing her from suing her ex-husband for amounts which allegedly accrued after her daughter became eighteen, she is estopped from now seeking such sums.

For over one hundred years it has been clear under Utah law that the word "child" when used in the context of support payments refers to girls eighteen and under. Thus, when appellant and appellee stipulated on November 29, 1960 that appellee should pay an agreed amount to appellant as support for the children it was clear that support payments for Sherri were only to continue until she reached the age of eighteen.

As a result of the stipulation the trial court ordered that appellee pay "$100.00 per month for each child." Thus, by the very agreement which established appellee's obligation for support payments, appellant voluntarily relinquished any right she had to enforce such payments to her after Sherri reached her majority.

This court has long recognized the doctrine of equitable estoppel. In *Dickerson vs. Colgrove,* 100 U.S. 578, 580, 25 L.Ed. 618 (1879) the doctrine was explained in the following words:

> [H]e who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

See also, *Kirk vs. Hamilton,* 102 U.S. 68, 26 L.Ed. 79 (1880); *Casey vs. Galli,* 94 U.S. 673, 24 L.Ed. 168 (1877).

In the instant case appellant agreed by stipulation to accept on behalf of her daughter the sum of $100.00 per month as child support. She thereby impliedly gave up any right to collect support owed to her daughter once she reached adulthood at age eighteen. In reliance upon this agreement appellee has greatly altered his financial position by using the money which would otherwise have been used as support payments for other purposes. In addition, appellant did not begin this action until more than two years after Sherri reached the age of eighteen. Such forebearance clearly constituted conduct which appellee could reasonably view as further affirmation of the validity of the stipulation as it related to child support.

Application of the doctrine of estoppel in this case must lead to the conclusion stated above, viz., that appellant is without standing. Appellant has no immediate interest in the effect of § 15-2-1 for she is not in the eighteen to twenty-one age group affected. She is only affected by the statute with regard to her right to sue her husband for unpaid support payments; but her interest in them is only that of a trustee or fiduciary. She thus lacks the personal stake in an attack on the constitutionality of the statute necessary to insure concrete adverseness. In any case, by virtue of the stipulation which she signed on November 29, 1960, appellant waived her right (but not her daughter's) to bring an action for unpaid support after Sherri became an adult.

POINT II.
THE ISSUE RAISED BY APPELLANT IS NOW MOOT

It is well established that the federal judiciary cannot review cases which are moot, since article III of the United States Constitution requires the existence of a "case of controversy". *Liner vs. Jafco, Inc.,* 375 U.S. 301, 306 (1964); *Powell vs. McCormack,* 395 U.S. 486, 496 (1969): This court has stated:

> [F]ederal courts are without power to decide questions that cannot affect the rights of the litigants . . . before them. *North Carolina vs. Rice,* 404 U.S. 244, 246 (1971)

In the instant case appellant attacks § 15-2-1 on the grounds that it unfairly discriminates between men and women in the eighteen to twenty-one age group. But as to appellant and her daughter this question is clearly moot.

Appellant herself is much older than twenty-one. Her daughter, Sherri, whose interest appellant appears to wish to represent is similarly over the age of twenty-one (Sherri became twenty-one on February 12, 1974).

Thus, even if appellant has standing to represent her daughter's interest, neither she nor her daughter possess rights which can be affected by the outcome of this proceeding. The issue is, therefore, moot.

POINT III.
THIS COURT SHOULD APPLY THE RATIONAL BASIS TEST

In equal protection cases this court has adopted a two-tiered approach. Where legislation has appeared to impinge upon a "fundamental right or to be based upon 'suspect'

criteria," it has been subjected to strict judicial scrutiny. See, for example, *Bolling vs. Sharpe,* 347 U.S. 497 (1954); *Korematsu vs. United States,* 323 U.S. 214 (1944). In such cases the burden has been placed upon the state to demonstrate that the challenged legislation serves a compelling state interest.

In all other cases the court applies the "rational basis" test which requires only that

> the classification must be reasonable, not arbitrary, and must rest upon same ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *F. S. Royster Guano Co. vs. Virginia,* 253 U.S. 412, 415 (1920)

Under this test the individual attacking the statute has the burden of proving "that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley vs. Natural Carbonic Gas Co.,* 220 U.S. 61, 79, 55 L.Ed. 369, 377 (1911).

Until recently it was clear that the "rational basis" test was applicable in cases of alleged sex-based discrimination. *Goessaert vs. Cleary,* 335 U.S. 464 (1948); *Muller vs. Oregon,* 208 U.S. 412 (1908). Appellant contends, however, that in two fairly recent cases this court has adopted the strict scrutiny test, or something very similar to it, in sex discrimination cases.

In *Reed vs. Reed,* 404 U.S. 71, 30 L.Ed.2d 225 (1971) the court was asked to consider the constitutionality of an Idaho statute which provided that as between individuals equally qualified to act as estate administrators, men must be preferred to women. In defining the issue thus presented the court stated:

> The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bars a *rational relationship* to a state objective that is sought to be advanced by the operation of . . . [the Idaho statute]. 404 U.S. at 76 [Emphasis added].

The language of the above quotation certainly supports the assumption that some form of the rational basis test was used. Appellant, however, contends that the decision sets forth a kind of hybrid test calling for greater judicial scrutiny. As support for this proposition appellant points to the court's statement that a statutory scheme treating individuals differently on the basis of sex is "subject to scrutiny. . . ." *Id.* at 75. This view overlooks the fact that the court obviously was aware of the significance of the expression "strict scrutiny", choosing instead to speak only of "scrutiny." Furthermore, since the decision contains no mention of "compelling state interests" or of the burden of proving the same, it is reasonable to assume that this test was not applied.

In *Reed* the court struck down the Idaho statute on the grounds that it gave mandatory preference to males merely to accomplish the elimination of a hearing on the merits to determine qualification. Thus, according to the court, even though the object of reducing the workload on probate courts may be legitimate, this means could not be accomplished by eliminating females from consideration through "arbitrary legislative choice . . ." *Id.* at 76. *Reed* therefore appears to add to the rational basis test the caveat that while a statutory scheme may logically further some legitimate legislative object, the means adopted has no rational constitutional basis if the unequal treatment is an arbitrary preference based

solely upon sex. In effect, *Reed* retains the rational basis test, but eliminates administrative convenience as an acceptable "rational basis" in sex discrimination cases. As will be seen, administrative convenience is not advanced as reason for the statute here under attack.

A second case cited by appellant as supporting its theory that strict scrutiny should be applied here is *Frontiero vs. Richardson,* 411 U.S. 677 (1973). There the court struck down a United States statute which allowed servicemen to claim their wives as dependents for certain benefits, but a servicewoman could claim her husband only if she paid over one-half his support. No clear rule emerges from the decision. Justice Brennan writing for four members of the court applied the strict scrutiny test. Justice Powell's concurring opinion in which Justice Blackmun and the Chief Justice joined applied the rational basis test. Justice Stewart concurred in the judgment but did not indicate what test should be applied. Justice Rehnquist in dissent agreed with the District Court decision which applied the rational basis test.

At the outset it must be recognized that *Frontiero* provides little precedence as to the applicable test. This court has stated that lack of agreement by a majority of the court on principles of law prevents a decision "from being authoritative determination for others cases." *United States vs. Pink,* 315 U.S. 203, 216 (1941). See also, 20 Am. Jur. 2d *Courts* § 195.

In any case the differing views are probably more a matter of semantics than expressions of philosophical differences. The government's explanation for the statute was identical to that advanced in *Reed,* viz.: administrative efficiency. 411 U.S. at 681, 682. Justice Brennan's decision, in the context of this particular case, may simply stand for the proposition that where administrative convenience is advanced as the sole reason for adopting a particular statute, the proponent must sustain the burden required by the strict scrutiny test. *Id.* at 688, 690. This view is consistent with the court's statement in *Shapiro vs. Thompson,* 394 U.S. 618, 633 (1969) that "[t]he saving of welfare costs cannot justify an otherwise invidious classification."

Justice Stewart's concurring opinion is based, in part, upon *Reed.* As noted above, *Reed* simply eliminates administrative convenience as an acceptable explanation under the rational basis test. Presumably, however, a statute may still be sustainable, even where its underlying policy is administrative convenience, if the state bears the burden of demonstrating a compelling interest which cannot be achieved by less drastic means. Thus the two views are not necessarily contradictory.

Furthermore, in two subsequent cases in which the question has been raised, this court has refused to apply the strict scrutiny test in upholding statutes which utilized sex-based discrimination.

In *Kahn vs. Shevin,* ..... U.S. ....., 94 S.Ct. 1734 (1974) the court sustained a Florida statute which allowed a $500.00 property tax exemption to widows, but no exemption to widowers. The majority opinion stated that the statute rested "'upon some ground of difference having a fair and substantial relation to the object of the legislation.'" 94 S.Ct. at 1737 citing *Reed, supra.* It further noted that the state tax was *"reasonably designed* to further the state policy . . ." *Id.* [Emphasis added].

In *Geduldig vs. Aiello,* ..... U.S. ....., 94 S.Ct. 2485 (1974) a California statute was upheld which prohibited payment of state medical insurance benefits for expenses arising from normal pregnancies. The majority opinion stated that such a statutory scheme was "rationally supportable." 94 S.Ct. at 2491. Although the decision does not specifically refer to the rational basis test, it is manifest that this is the test which was used. The dissenting opinion makes this particularly clear.

If, as appellant contends, the court in *Reed* and *Frontiero* laid down a rule of stricter scrutiny than employed in traditional rational basis test, it is equally true that this test was abandoned in *Kahn* and *Geduldig.* In both of these decisions *Reed* and *Frontiero* were distinguished by the majority on grounds applicable to the instant case.

In *Kahn,* for example, the majority opinion noted that *Reed* and *Frontiero* were distinguishable because in those cases the proponent attempted to justify the statutory scheme as being *"solely* for administrative convenience." 94 S.Ct. at 1737 (emphasis added by the court). As in *Kahn,* in the instant case administrative convenience is not a reason for adoption of the statute. On the contrary, administrative procedure would be greatly simplified by a standardization of the age of majority.

In *Geduldig* the majority opinion distinguished *Reed* and *Frontiero* on the fact that the statutory scheme was based upon pregnancy rather than gender *per se.* 94 S.Ct. 2492 n. 20. The court pointed to the presence of women in both the excluded and included classes as evidence of the non sex-based nature of the discrimination. *Id.* (By contrast, in *Reed* under the Idaho statute no woman could be appointed as

administratrix where she was in competition with a male; and in *Frontiero* no woman who provided less than half her husband's support could receive dependent's benefits.)

The instant case is more nearly similar to the facts in *Geduldig.* The Utah statute is based primarily upon two characteristics: age and marital status. Within the age distinction is a sex-based subgrouping. As to appellant the sex-based distinction has no direct application since a male similarly situated would have identical rights to those of appellant. Moreover, of the two classes created by the statute — minors and adults — males and females may be found in both. Similarly, since minority is ended by marriage under the statute, in the eighteen to twenty-one age group there may be both male and female adults. These facts indicate that sex is a secondary consideration under the statute, unlike the statutory schemes in *Reed* and *Frontiero.*

From the foregoing it is clear that the rational basis test of *Kahn* and *Geduldig* should be applied.

It should be further noted that a majority of federal courts have utilized some form of the rational basis test in sex-based discrimination cases. Among recent court of appeal decisions see, for example, the following: ***Miskunas vs. Union Carbide Corp.,*** 399 F.2d 847 (7th Cir. 1968); ***Robinson vs. Board of Regents of Eastern Kentucky University,*** 475 F.2d 707 (6th Cir. 1973); ***Morris vs. Michigan State Board of Education,*** 472 F.2d 1207 (6th Cir. 1973); ***Gruenwald vs. Gardner,*** 390 F.2d 591 (2nd Cir. 1968); ***Lamb vs. Brown,*** 456 F.2d 18 (10th Cir. 1972); ***Eslinger vs. Thomas,*** 476 F.2d 225 (4th Cir. 1972); ***Schattman vs. Texas Employment Commission,*** 459 F.2d 32 (5th Cir. 1972); ***Paiewonsky vs. Paiewonsky,*** 446 F.2d 178 (3rd Cir. 1971).

POINT IV.

THERE IS A RATIONAL BASIS TO THE DISTINCTION DRAWN BY SECTION 15-2-1

As noted above, the rational basis test requires that

> the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co., supra.*

The starting point in any equal protection case must therefore be an inquiry as to the object of the legislation. As to § 15-2-1, it is clear that the underlying legislative objective is to establish an objectively identifiable point in time when a member of society is given the responsibilities and benefits of adulthood. The mean chosen to establish this object was to adopt a statute setting forth the prerequisite to emancipation: marriage, or the attainment of a particular age.

In order for the legislature to set this standard it was necessary to make a determination as to what segments of society were most capable of coping with the rights and responsibilities of adulthood. The Utah legislature decided that married individuals, single men over twenty-one, and single women over eighteen belonged to the groups best suited for emancipation.

Unfortunately, any determination as to the age of adulthood, whether in Utah or in any other state, is not one easily supportable by empirical means; rather it is one based upon human experience. Indeed, this determination was one which the legislative branch, rather than the judiciary was best suited to make.

In *Baker vs. Carr,* 369 U.S. 186 (1962) this court examined the doctrine of nonjusticiability where political questions were concerned. The decision provides the following lists of factual situations involving political questions:

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217.

As defined above the setting of the age of majority is clearly a political question. There are, for example, no "judicially discoverable and manageable standards" for resolving the question of when a person is an adult. Similarly, any determination that a particular age should be adopted, or that the present distinction is without rational basis requires a "determination of a kind clearly for nonjudicial discretion."

The Utah Supreme Court recognized the political nature of the issue posed when it stated:

> We think this case and the proposal under consideration provides a very good example of why the courts should not initiate a change in the law as advocated by the plaintiff. If such a change is desirable, that is a matter which should commend itself to the attention of the legislature. 517 P.2d 1010, 1013.

If the policy determination of the legislature is accepted (i.e., that young married individuals are better suited for

adulthood than singles, or that eighteen-year-old girls are better suited than boys of similar age), the Utah statute clearly meets the requirements of the rational basis test. The adopting of a majority statute has a fair and substantial relation to the object of emancipating worthy infants. Similarly, the legislature has emancipated all individuals who it has determined are equally situated as to qualification for emancipation.

Several facts may be adduced which support the above determination. For example, appellee requests this court to take judicial notice of the fact that women mature physically at an earlier age than men. The legislature may have also concluded that women mature emotionally at an earlier age.

The legislature may have felt that women should be emancipated earlier than men because they finish their education at an earlier age. Statistics published by the United States Department of Health, Education and Welfare indicate that a higher proportion of men are enrolled in college than women and a much higher proportion of men than women are in graduate school.

The 1972 study shows that 33,462 male Utah residents were enrolled in undergraduate courses; while only 26,151 women were similarly enrolled. On the graduate level there were 5,507 males and 2,287 females. National Center for Education Statistics, *Fall Enrollment in Higher Education 1972*, 52, 53 (1972).

It has also been established that women marry earlier than men. See United States Department of Commerce, *Statistical Abstract of the United States 1974*, 68 (1974).

Finally, a large number of young male members of the Church of Jesus Christ of Latter-day Saints (often called the Mormon Church) leave their homes at age nineteen or twenty to serve in missions in other parts of the country or in foreign lands. (The parties' son Rick is currently serving such a mission.) An unpublished report of the Church's missionary department indicates that at the beginning of 1973 there were over 5,000 such young men from Utah proselyting in Church missions. There were also about 700 Utah women, all of whom are older than twenty-one. All of these missionaries are supported through private donations of friends and family members.

In view of such facts the legislature may have felt that women were better able to seek support payments directly from their fathers without the aid of their mothers (because less likely to be in school or on a mission). Or it may have been felt that women of the eighteen to twenty age group was more physically and emotionally mature.

Whatever the reason,

> Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. *McDonald vs. Board of Election Committee of Chicago*, 394 U.S. 802, 809, 22 L.Ed.2d 739, 745 (1969).

In this case there are ample grounds to justify § 15-2-1. The legislature should therefore be presumed to have acted constitutionally.

POINT V.

IF THE COURT HOLDS THAT THE STATUTE IS UNCONSTITUTIONAL, IT SHOULD SET THE AGE OF MAJORITY IN MALES AND FEMALES AT EIGHTEEN.

In Point III. of its Brief appellant contends that invalidation of § 15-2-1 can only lead to reversion to the common law age of majority: twenty-one. This statement clearly implies that this court's only recourse is to eliminate a statutory classification, rather than extending benefits to all individuals similarly situated. This is not the case.

In *Skinner vs. Oklahoma,* 316 U.S. 535 (1941) the court struck down a statute which required sterilization of certain classes of criminals. Since one basis of the decision was that the state could not justify the distinction between classes of criminals, the state apparently urged the court to extend coverage of the act to all classes. The court noted that such an extension was within its province, but declined to do so on the ground that enlargement or contraction would not necessarily solve the "constitutional difficulty." 316 U.S. at 543.

The ability of the court to expand or contract was further noted in *Welsh vs. United States,* 398 U.S. 333 (1969) where Justice Harlan in his concurring opinion stated:

> Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. *Id.* at 361.

It is ironic that the statute under attack here largely has the effect of providing benefits to women at an earlier age than men. Yet it is a woman in the capacity of a fiduciary to her daughter who is attacking the enactment. In its Brief appellant notes that the statute benefits eighteen-, nineteen-, and twenty-year-old women by allowing them to enter into contracts, bring suit, and administer estates, at an earlier age than males (p. 23). (To this list may be added the fact that the statute allows women to buy liquor at an earlier age. Section 32-7-15, Utah Code Annotated (1953, Supp. 1973)).

At the same time appellant urges elimination of these rights by complete invalidation of the statute (p. 29, 30).

A more rational approach would be to extend the above benefits to males eighteen years of age and older. Indeed, federal and state legislatures have made it clear that they feel age requirements for rights closely associated with majority should be lowered. See, for example, the 26th Amendment to the United States Constitution which lowered the minimum voting age to eighteen; the Selective Service Act, 50 U.S.C. §§ 451, et seq. which establishes that every male of eighteen years and older has a military service obligation; § 74-1-1, Utah Code Annotated (1953) giving eighteen-year-olds the legal ability to write wills; §§ 41-2-1, et seq. which makes drivers eighteen years and older solely responsible for their acts of negligence and removes restrictions on procurement of driver's license after that age; §§ 55-10-63, et seq. which establishes jurisdiction of the juvenile court over those younger than eighteen; and § 76-10-103 which prohibits sale of tobacco to persons under nineteen years of age. Viewing such facts the Utah Supreme Court in its decision in this case stated:

> Assume that we take judicial cognizance of the trend in the differing role of women, perhaps we should similarly notice the trend toward the earlier emancipation and fuller freedom of conduct of minors; and that this applies to both boys and girls. One indication of this is the recent reduction of the age for voting to 18. *Stanton vs. Stanton,* 30 Utah 2d 315, 319, 517 P.2d 1010 (1974).

In several recent sex-based discrimination cases courts chose to extend benefits to an excluded class, rather than deny benefits to the benefited class. In *Harrigfeld vs. District Court of Seventh Judicial District,* 511 P.2d 822 (Idaho 1973), a statutory scheme almost identical to that under present consideration was held to violate the Fourteenth Amendment. There, however, the state adopted the position taken by appellant here: namely, that the statute must fall entirely and the common law age of majority (twenty-one) be applied. 511 P.2d at 827. The court rejected this argument, opting instead for a setting of the age of majority at eighteen. In so doing it cited recent adoption in Idaho of the Uniform Probate Code which established the earlier age of minority for both men and women. *Id.*

In *Moritz vs. Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972) the court declared that a statutory scheme violated equal protection which allowed a tax deduction to single women for support of an invalid parent, but allowed no similar deduction for a single man. Rather than voiding the statute, however, the court extended the deduction to single males. 469 F.2d at 470. In so doing the court noted the disruption which would have been caused by invalidating the entire section. *Id.,* n. 5.

Similarly, in *People vs. Ellis,* 10 Ill.App.3d 216, 293 N.E.2d 189 (1973), and *Lamb vs. Brown, supra,* courts held

that statutes setting a different age limit for men and women subject to the jurisdiction of juvenile courts violated the Equal Protection Clause. However, the courts chose to extend the benefits of juvenile court supervision to the excluded class rather than completely invalidating the statuory scheme or reducing the age limit to that of the excluded class. See also, *In the Matter of Patricia A.,* 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972).

The instant statute provides an excellent example of an enactment, the benefits of which should be expanded, not contracted. The legislature and the state Supreme Court have indicated a preference for lowering the age of majority in males rather than raising it for females. (See the discussion above.) The benefits of majority are considerable and should be extended to as many members of society as possible. And perhaps most importantly, to completely invalidate the statute would work hardship upon many divorced fathers, who in good faith have relied upon the § 15-2-1 in halting support payments to their wives when a daughter reached age eighteen. To reach a different decision would be to invite the disruption warned against in *Moritz, supra.*

Admittedly, an equalizing of the age of majority will not please appellant. However, appellee submits that in determining whether to expand, constrict, or completely destroy the statutory scheme, the court's attention should be focused on the class of individuals at whom the legislation is directed. This class is clearly young people approaching adulthood. The legislation is not aimed at appellant. Her interest is at best derivitive.

Thus, the inquiry should be whether the best interests of eighteen-, nineteen-, and twenty-year-olds are served by

excluding them from the benefits of adulthood or extending these benefits to them. Since §§ 78-45-1, et seq. guarantees these individuals a right of support to age twenty-one, it is difficult to conceive of any reasons why this court should not choose to set the age of majority at eighteen.

CONCLUSION

Based upon the foregoing, appellee, James Lawrence Stanton, Jr., respectfully requests that this appeal be dismissed because of appellant's lack of standing and because the issue raised is now moot.

Quite apart from such procedural deficiencies, however, appellee submits that the statutory scheme under attack here meets the requirements of the court's "rational basis" test, and indeed of the modified "strict scrutiny" test suggested by appellant.

In any case, even if the statute were held to be unconstitutional, this court should lower the age of majority in men rather than voiding the entire statute, thereby raising the age of majority for women to twenty-one.

Respectfully submitted,

D. GARY CHRISTIAN
KIPP AND CHRISTIAN
520 Boston Building
Salt Lake City, Utah 84111
Attorney for Appellee